# BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Nicole Curling dated April 15, 1994, amended August 28, 1998, alleging discrimination in employment on the basis of sex, sexual harassment and sexual solicitation, and by Order dated September 30,1999, alleging reprisal.

**B E T W E E N :**

Ontario Human Rights Commission

- and -

Nicole Curling

**Complainant**

**- and -**

Alexander Torimiro
The Victoria Tea Company Ltd.
The Torimiro Corporation

**Respondents**

## INTERIM DECISION

**Adjudicator** : Katherine Laird

**Date** : May 19, 2000

**Board File No:** BI-0245-99

**Decision No** : 00-008-I

Board of Inquiry (*Human Rights Code*)
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## APPEARANCES

| | |
|---|---|
| Ontario Human Rights Commission | Joanne Rosen<br>*Counsel* |
| Nicole Curling<br>*Complainant* | Geri Sanson<br>*Counsel* |
| Alexander Torimiro<br>*Personal Respondent* | Stacey Reginald Ball<br>*Counsel* |
| The Victoria Tea Company Ltd.<br>The Torimiro Corporation,<br>*Corporate Respondents* | Stacey Reginald Ball<br>*Counsel* |

## INTRODUCTION

On December 22, 1999, the Board of Inquiry released my decision on the merits of the complaint of Nicole Curling ("Curling") against Alexander Torimiro ("Torimiro"), The Victoria Tea Company ("Victoria Tea") and The Torimiro Corporation. I found that Torimiro had subjected Curling to discriminatory treatment on the basis of her gender, as well as to sexual harassment and solicitation in the workplace, and to retaliatory conduct when his sexual advances were rejected. I also found that Torimiro violated Curling's right to claim the protection of the *Code* when he served her with a Statement of Claim seeking damages of $1.5 million as a result of her human rights complaint. I held that Torimiro's conduct had infringed Curling's rights under s.5(1), s.7(2), s.7(3)(a) and (b) and s.8 of the *Human Rights Code*, R.S.O. 1990, c.H-19, ("*Code*"), in violation of the prohibition in s.9 of the *Code.*

With respect to the corporate respondents, I held Victoria Tea liable for the conduct of Torimiro, as its sole manager and owner, which constituted gender-based discriminatory treatment, sexual harassment and solicitation. I also held Victoria Tea liable, under s.45(1) of the *Code,* for both acts of reprisal, specifically the infringement of s.7(3)(b) and s.8.

I reserved on the question of the liability of The Torimiro Corporation. This issue had not been addressed in submissions. The Torimiro Corporation was not Curling's employer and did not appear to take a direct role in the events at issue in the complaint. In my decision, I gave the Commission and the complainant until January 20, 2000 to file written argument on the liability of this corporation, and allowed the respondents until February 10, 2000 to file responding argument.

In addition, the Human Rights Commission ("Commission") had requested an opportunity to make further submissions on an aspect of the public interest remedies. I allowed the Commission until January 20, 2000 to file supplementary written argument on the public interest remedies, and set February 10, 2000 as the deadline for responding submissions from the other parties.

During the period of time allowed for these further written submissions, the Board's Registrar received a telephone call from Fred Blucher, a lawyer who advised that he had just been retained by the respondents. Torimiro had acted for himself and the corporate respondents during the first several

days of hearing, in July 1999, and then had retained counsel, Munyonzwe Hamalengwa, in August-September 1999. Mr. Hamalengwa resigned from the file after representing the respondents on two hearing conference calls. After that, Torimiro stopped attending the hearing and corresponded directly with the Board's Registrar until Mr. Blucher was retained, presumably at some point early in January 2000.

The respondents did not file final written submissions on remedy prior to the deadline and did not request an extension of time to do so. On February 22, 2000, Mr. Blucher wrote to the Registrar advising that he no longer represented the respondents. Then, almost three weeks later, on March 13, 2000, a third lawyer, Stacey Ball, wrote to the Board, stating that he had instructions to commence an application for judicial review "in connection with the decisions made thus far in this proceeding" and inquiring as to the status of "the penalty stage of this proceeding". By subsequent correspondence, dated March 21, 2000, Mr. Ball requested an opportunity for the respondents to make submissions on remedy. That request was treated as a notice of motion and all parties were given the opportunity to file submissions on the request. The respondents' submissions, by letter dated April 19, 2000, also raised reasonable apprehension of bias as an issue.

This is my decision with respect to the two issues raised in the April 19, 2000 letter: reasonable apprehension of bias and the request for an opportunity to make submissions on remedy.

## REASONABLE APPREHENSION OF BIAS

*Position of the Respondents*

Counsel for the respondents makes the following statement in the letter of April 19, 2000:

> The remedy issue should be decided by another adjudicator. Torimiro is of the understanding that the adjudicator worked for the Complainant's father when he was a Cabinet Minister. This creates a very strong case of apprehension of bias. Indeed, the decisions made so far are suspect on this ground. It is partially because of this that the Respondents did not participate in the hearing since September 22, 1999.

The respondents did not make any further submissions on bias in their letter and did not bring any law to my attention. In a subsequent letter, dated May 5, 2000, Mr. Ball writes:

> Concerning the apprehension of bias issue, my instructions are that Mr. Torimiro objected once he became aware of the issue. He did not give up the right to pursue a judicial review or appeal on this or any other basis. Indeed, he refused to participate in the hearing process because, inter alia, of the apprehension of bias.

*Position of the Commission and the Complainant*

The responding written submissions of the Commission, adopted by the complainant, take the position that the facts do not support a reasonable apprehension of bias on the part of a reasonably informed bystander, as would meet the applicable test *per Newfoundland Telephone Co. Ltd. v. Board of Commissioners of Public Utilities* (1992), 89 D.L.R. (4th) 289 at 297. The Commission also relied on *Chomicki v. Ursulescu* (1994), 24 C.H.R.R. D/477 at D/485 (Sask. Q.B.), in which the Court determines that a human rights tribunal should not be disqualified from hearing a complaint on the basis of a "brief" and "unexceptional" involvement with one of the parties.

Further, the Commission and complainant took the position that, even if a reasonable apprehension of bias were found to exist in these circumstances, the respondents had waived or lost the right to disqualify the adjudicator on that basis by continuing to participate in the hearing after the issue of bias was raised. In support of the principle that a party will lose the right to object to bias by expressly or impliedly submitting to the tribunal's proceedings, the Commission cited two decisions: *Re Energy Workers' Union and A.E.C. Ltd.* (1985), 24 D.L.R. 4th 675 at 680-681 (F.C.A.; leave to appeal to S.C.C. denied); *Canadian Human Rights Commission v. Taylor* (1990), 75 D.L.R. (4th) 577 at 611 (S.C.C.).

*Background*

This issue has arisen because of information which I provided to the parties at the outset of the hearing. I became aware, during opening remarks by the personal respondent, that the complainant was the daughter of Alvin Curling and that the respondents were planning to call her father as a witness. The personal respondent included Alvin Curling's name on a list of his intended witnesses.

I decided, out of an abundance of caution, to disclose the fact that I had had some professional interaction with Alvin Curling many years prior to my appointment to the Board.

As I told the parties and counsel at the hearing on July 21, 1999, I was a member of a consultative committee set up by the Ministry of Housing, in 1985-86, to give advice to the then-Minister Alvin Curling on reform of the rent review legislation. At the time, and until 1987, I was employed as counsel to a legal aid clinic specializing in representing tenants before the rent review tribunal and the courts. In that capacity, I was nominated to sit on this committee which, to the best of my recollection, was called the Rent Review Advisory Committee. The committee was comprised of representatives of the housing development industry, landlord organizations, tenant organizations and members of the housing law bar, among others. The committee developed a package of reforms which was subsequently enacted into legislation and regulations. As I disclosed, during the tenure of the committee, Minister Curling attended meetings on a handful of occasions. I believe that I spoke to him at those meetings, two or three times, primarily about the work of the committee.

I decided to advise the parties of this previous interaction with Alvin Curling after Torimiro suggested, in his opening remarks, that the Commission`s decision to refer the complaint to the Board was tainted by bias arising from the fact that Alvin Curling, a provincial politician, was the complainant`s father. I thought it possible that, if Alvin Curling did appear as a witness, either for Torimiro or for his daughter, he would recall my participation in the committee. Although I was not of the view that my neutrality was in fact compromised by my interaction with Alvin Curling many years earlier, I thought it best, in the circumstances, to advise the parties of the facts at the outset, and to hear their submissions, if any, on whether a reasonable apprehension of bias could be found to exist.

None of the parties expressed any concern arising out of my disclosure. My hearing notes indicate Torimiro stated that he did not object to my continuing as the adjudicator in this matter, and that he had "absolute faith in my integrity". If he subsequently harbored misgivings about whether my neutrality in this matter was effected by, or could reasonably appear to be effected by, my past interaction with Alvin Curling, he certainly did not express such misgivings at any time during the several days of hearing which he subsequently attended in July 1999.

Further, in two letters from Torimiro, addressed to me after he had stopped attending the hearing, he did not raise bias as an issue. In a letter dated September 30, 1999, and copied to the other parties, Torimiro acknowledged receipt of my just-released interim decision, and commented on its contents, but did not refer in any way to possible bias or to my earlier disclosure. His introductory paragraph stated: "I would like to thank for your perseverance and your fairness under some very trying circumstances".

In a second letter sent to my attention, dated October 5, 1999, Torimiro takes issue with the Commission's investigation of the complaint, and its disclosure, but he again does not raise bias as a concern. Although he is presumably criticizing the hearing process, as well as the Commission, when he writes that "This matter is a nuisance and a disgrace", he does not suggest that my prior contact with Alvin Curling is an issue for him. Torimiro concludes the letter by stating that he is "in the process of assembling a legal team that will determine how best to deal with this Complaint, the current civil action against the Complainant and any planned civil action against the Commission and its Counsels" and that he "will not be rushed". I note, as an aside, that Torimiro did not request an adjournment in this letter, or subsequently.

*Analysis and Determination*

The motion that I disqualify myself is dismissed on two grounds.

Firstly, in my view, the respondents cannot now resile from their position on the issue of reasonable apprehension of bias. When my disclosure was made to the parties, the personal respondent expressly stated that he had no objection to me continuing to hear and decide the complaint. Although Torimiro was acting without the advice of counsel on that occasion, I note that the respondents were later represented, by Mr. Hamalengwa, and, briefly, by Mr. Blucher. Nonetheless, the respondents never, in written or oral submissions to me, raised my prior interaction with Alvin Curling as a possible basis for an apprehension of bias until Mr. Ball`s letter of April 19, 2000. This letter was dated nine months after my disclosure to the parties, five months after completion of the oral hearing, and almost four months after release of the decision on the merits. By continuing to participate in the hearing in July through to mid-September 1999, and then withdrawing from further attendance

without raising bias as an issue, the respondents lost the right to object to my jurisdiction on that basis.

Secondly, even if the respondents have not waived their right to raise bias as an issue, I find that the facts in this case do not support the respondents' motion. I accept the submissions of the Commission with respect to the appropriate test to be applied in determining whether a reasonable apprehension of bias exists. In my view, a reasonable bystander, apprized of the facts set out above, could not reasonably perceive bias on my part in hearing and deciding the complaint before me. My interaction with Alvin Curling took place some fourteen years before commencing this hearing. It was a brief, professional interaction, and did not relate in any way to the legal issues, or even the area of law, of concern in the present matter. Accordingly, I dismiss the respondents' motion, and will continue to decide the outstanding issues in this matter.

## ADDITIONAL TIME FOR RESPONDENT SUBMISSIONS ON REMEDY

*Procedural Background*

I would like to, first of all, deal with the process by which this issue has come before me. Following the request from Stacey Ball for an opportunity to make submissions on remedy, counsel for the complainant, Geri Sanson, responded in writing, objecting to the Board receiving submissions from the respondents and noting that the respondents had been given notice of the hearing at every stage in the process. Nonetheless Ms Sanson forwarded to Mr. Ball her written submissions on remedy, both those presented at the oral hearing on November 8, 1999, and the subsequent written submissions filed pursuant to my decision. Unfortunately, the Commission was in the process of changing its counsel and did not respond to the correspondence of other counsel on this issue.

After some time had passed, I decided that it would be most efficient to treat Mr. Ball's letter as notice of a motion for an order allowing the respondents to make submissions on remedy, and to set times for written argument on that issue. By letter dated April 12, 2000, the Board's Registrar advised the parties of my decision to allow Mr. Ball to file submissions, by April 19, in support of his request, and to allow responding submissions by the other parties. At the request of Commission counsel, the Registrar confirmed, by letter dated April 14, 2000, that I was permitting submissions on the

appropriateness of allowing the respondents to address remedy, and that I was not, at that time, inviting submissions on remedy.

*Submissions of the Respondents*

Notwithstanding that clarification in the Registrar's letter of April 14, 2000, Mr. Ball filed written submissions which dealt almost entirely with the scope and quantum of the remedies to be ordered, and with the issue of bias. His letter did not cite any law in support of the position that his clients should be allowed to address remedy at this late stage, nor did it address the issue of whether the other parties would suffer prejudice if an extended opportunity for submissions were granted.

In addressing remedy, counsel stated that he was responding to the written submissions of the complainant, both those prepared for the oral hearing on November 8, 1999, and the subsequent written arguments served on his client and filed with the Board on January 22, 2000. Mr. Ball advised that he had not received copies of the Commission's written argument and he purportedly reserved the right to make additional submissions upon receipt of those documents.

On May 5, 2000, after receipt of the submissions by the other parties, Mr. Ball wrote a further unsolicited letter to the Board, setting out the legal basis for his position that an extension of time should be granted for respondent submissions on remedy. He wrote that the other parties had "pointed to no prejudice" in opposing the extension, and cited *Bueychuck v. Danson* (1992), 8 O.R. (3d) 762 (Div. Ct.) in support of his submission that prejudice was the "critical issue in determining whether an extension of time should be permitted".

*Submissions of the Commission and the Complainant*

The Commission's responding submissions, dated May 3, 2000, correctly noted that the substantive issue, namely remedy, was not yet before the adjudicator. Commission counsel asked that I disregard Mr. Ball's premature arguments on remedy. On the question of an extension of time, counsel took the position that, in the absence of compelling and exceptional circumstances, it would be inappropriate for the Board to "re-open its hearing" to permit the respondents to provide submissions on remedy.

Counsel for the complainant, by letter dated May 3, 2000, adopted the Commission's responding submissions.

*Analysis and Determination*

The respondents stopped attending the hearing into this complaint in September 1999, at a point part way through the cross-examination of the complainant. They were served with notice of all subsequent dates but did not re-appear at the hearing. The oral hearing into this complaint was completed six months ago, on November 8, 1999, and a decision on the merits was released six weeks later. The only outstanding issue is the remedy to be ordered. The written submissions on remedy which were presented by the Commission and the complainant on the last day of oral hearing, did not differ in dealing with the scope and quantum of a monetary remedy. Although Mr. Ball states that he has not received a copy of the Commission's written argument, this has not affected his ability to respond to the substance of the Commission's submissions on an appropriate monetary award, given that the Commission's submissions in this area matched that of those of the complainant, which were in his possession. The submissions on remedy which Mr. Ball filed with the Board on April 19, 2000, present argument on the various monetary orders sought by both of the other parties at the hearing on November 8, 1999.

The subsequent written submissions of both the Commission and the complainant, which were solicited by my decision of December 22, 2000, have now been sent to Mr. Ball. His correspondence indicates that the Commission's submissions, dated January 20, 2000, were not in his hands until receipt of Ms Rosen's letter dated May 3, 2000. In accordance with my decision, only two issues were addressed in those submissions, and in the complainant`s submissions filed January 22, 2000, namely the liability of the Torimiro Corporation and the scope of the non-monetary public interest remedies. These two issues were not addressed by Mr. Ball in his submissions of April 19, 2000.

I have concluded that an order allowing the respondents to file written submissions on remedy at this late stage will not result in prejudice to the Commission or the complainant, given that the decision on remedy is still outstanding. Notwithstanding the failure of the respondents to continue their participation in this proceeding after July 1999, I would prefer to have the benefit of the respondents' submissions on remedy before making my final determinations. In my view, it is in the interests of all of the parties that I have full submissions on the remaining issues to be decided.

Accordingly, I will afford the respondents an opportunity to file written argument on remedy, with some limitations.

On the question of an appropriate monetary remedy, I will extend the time for such submissions from November 8, 1999 to April 19, 2000, the date on which the Board in fact received submissions from Mr. Ball dealing with the scope and quantum of a monetary award, among other things. Given that Mr. Ball has already addressed these issues in written argument to the Board, it would be inappropriate and unfair to allow a further opportunity for submissions.

Further, I will allow the respondents fifteen days from the date of release of this decision to serve and file written argument on the two issues which are the subject of the Commission`s and the complainant`s more recent written submissions, dated January 20 and 22, 2000, respectively. The two issues which the respondents may address, in response to those submissions, are: the liability of the Torimiro corporation and the scope of the public interest remedies.

The Commission and the complainant may file submissions in reply, if they choose to do so, by no later than twenty-five days after the date of this decision. I do not need to hear from the Commission or the complainant in reply to the respondents' submissions of April 19, 2000, on the following issues as referred to therein: Harm Through Publication; Cultural Differences; Delay; Nature of Violation; Interest: Lost Income.

Dated at Toronto this 19th day of May, 2000.

Katherine Laird
Vice-Chair